



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

August 11, 2023

Re: FOIA Request NLRB-2023-000663

Dear James Sherk (America First Policy Institute):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on January 25, 2023, where you state: "For the covered period (10/1/2022 to 1/25/2023), I request copies of all federal records created by the following individuals on non-official electronic messaging accounts that were subsequently forwarded to an official electronic messaging account during the covered period: Lauren M. McFerran; Gwynne A. Wilcox; David M. Prouty; Peter Sung Ohr; Jennifer Abruzzo; Jessica Rutter; Richard Bock; Nancy Platt; and Ken White." You assumed financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on January 25, 2023.

Pursuant to the FOIA, inquiries were made to the named individuals for responsive records and reasonable searches of the email accounts of the named individuals were conducted using the Agency's search tool, Microsoft Purview, searching for emails sent or received on non-official Agency equipment or accounts which were subsequently forwarded to official Agency accounts or equipment. These search yielded 13 pages of responsive, releasable records, which are attached. No responsive records were located for Jennifer Abruzzo, Richard Bock, Lauren McFerran, Peter Ohr, Nancy Platt, Gwynne Wilcox, and Ken White.

After a review of the attached 13 pages, I have determined that certain portions of the records are exempt from disclosure under Exemptions 5, 6, and 7(C) of the FOIA (5 U.S.C. § 552(b)(5), (b)(6) and (b)(7)(C)). Specifically, the redactions are made pursuant to Exemption 5, which protects certain inter- and intra-agency communications protected by the deliberative process and/or attorney work product privileges; FOIA Exemption 6, which protects personally identifying information the release of which would constitute a clearly unwarranted invasion of personal privacy; and FOIA Exemption 7(C), which protects records or information compiled for law enforcement purposes, the release of which could

reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(5), (b)(6), and (b)(7)(C).

Other responsive records, totaling 64 pages, are being withheld in their entirety pursuant to FOIA Exemption 5 (5 U.S.C. § 552(b)(5)). Regarding the records identified as responsive but withheld in their entirety under FOIA Exemption 5, they include internal communications containing legal analysis, research, and draft recommendations regarding the processing and consideration of unfair labor practice cases.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 is designed to protect and promote the objectives of fostering frank deliberation and consultation within an agency and to prevent a premature disclosure that could disrupt and harm the agency’s decision-making process. *Id.* at 150-152. The deliberative process, and attorney work-product privileges are incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies in order to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, i.e., prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, i.e., “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). The protected status of a predecisional record is not altered by the subsequent issuance of a decision, see, e.g., *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005), by the agency opting not to make a decision, see *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995),

aff'd, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney's mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses, and strategies. *Id.*; see also *Wolfson v. United States*, 672 F.Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the withheld records meet the requirements of Exemption 5's deliberative process and attorney work-product privileges. They contain predecisional discussions concerning and analysis of issues involved in the processing of ongoing unfair labor practice cases. These records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. Other records reflect the analysis and opinions of Agency staff and attorneys created as part of the decision-making process regarding the processing of unfair labor practice cases, and thus would additionally be protected by the attorney work-product privilege. In short, Exemption 5 may properly be applied to all of these records to protect the Agency's internal communications by and among Agency staff as they engage in the debate and analysis of policies, practices, and other legal obligations and case processing matters before it. *Sears, Roebuck and Co.*, 421 U.S. at 150-52.

For the purpose of assessing fees, we have placed you in Category C, as a representative of the news media, in that you qualify as a person "actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." NLRB Rules and Regulations, 29 C.F.R.

§ 102.117(d)(1)(vii). Accordingly, there is no charge assessed for this request. Given your placement as a news media requester, your request for a fee waiver is moot.

You may contact William T. Hearne, the FOIA Attorney-Advisor who processed your request, at (202) 273-0139 or by email at william.hearne@nrlrb.gov, as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Kristine M. Minami, FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlrb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt, Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

August 11, 2023

Page 5

Any appeal must be postmarked or electronically submitted within 90 calendar days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer

Attachment: (13 pages)